Problems with Defining Protected and Unprotected Speech: Ely and Sunstein's Approaches to the Problem

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The first amendment of the United States Constitution contains within it a right to free speech. This has long been seen as a cornerstone of American society and democracy. It ensures that the people, from whom the government is granted its power, are allowed to speak their minds and call into question their leaders. Such a freedom is something to be celebrated; however it is not as cut-and-dried as it may seem. For reasons of common sense, not all speech is protected by the first amendment. A person is not allowed to go into a theatre and yell, "Fire!" This is obviously unprotected speech, which is where a problem arises. How are we to define protected and unprotected speech? John Hart Ely suggests an approach in which a "specific threat" method and "unprotected messages" method are used in conjunction with each other in order to determine protected speech depending on the situation. Cass R. Sunstein offers us a different approach in which two questions are asked based on the value of the speech and how the government restricts it. First, we will look at Ely and Sunstein's suggestions and the means by which they arrived at them. From there we will look at their practicality in regard to three specific situations; obscenity cases, hate speech cases, and internet political speech. Using these examples we will see that Ely and Sunstein's methods still leaves us with gaps in the definition, and with unpopular or undemocratic results.

Justice Oliver Wendell Holmes, Jr. described the clear and present danger exception saying, "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." This doctrine was later amended by Justice Felix Frankfurter who advocated an approach by which the state's interests were weighed against that of the individual, and if the state's interest was

more valuable the speech could be prohibited. The problem with these definitions of protected and unprotected speech is that they are based in the social reality of the moment rather than in the law. Holmes was speaking during World War I, in regard to the Espionage Act. Frankfurter was deciding in a case prohibiting the speech of communists. Each was working at a time and in a place that made people feel uneasy about the particular groups whose speech was in question. Neither of these types of speech would be found as unprotected today. The specific threat method allows for public panics to become the policy of the courts. If the Supreme Court decides that it is not a good time for dissent, then free speech is effectively curtailed. If Saddam Hussein's Bath Party wanted to start a political party in the United States today, it would be interesting to see what would be said using this method of interpretation.

The other method mentioned by Ely stems from absolutism. Absolutism states that there is no speech that is not protected. The problem with this stems from the obvious previous example of the person in a theater yelling, "Fire!" Most judges and justices are going to realize that not all speech is protected. However, the unprotected messages method says that all speech is protected "save that which falls within a few clearly and narrowly defined categories" (Ely 111). This method seems to counteract the arbitrary effect of the clear and present danger method, but it runs into problems of its own. Ely uses the example of a politician using a bull horn to promote his campaign (111). There is nothing inherently wrong with a politician campaigning and asking for votes. However, we do believe that it is not the right of the politician to do so in an intrusive and disturbing manner. Ely gives the example of using a sound truck or bull horn pointed at a person's window in the middle of the night. These methods are

obviously not intended to be protected by the idea of free speech. However, they would be protected unless the context of the situation was taken into account. For this reason, the unprotected messages reasoning may not work.

Ely's suggestion is that we use a method that is a mix between the two. He says that when the state is trying to avert an evil that is not directly associated with the speech a specific threat method may be used. In the case of the state attempting to avoid a threat that is directly connected with the conveyance of the message an unprotected messages approach may be used (112). Using this method we will look at the examples of obscenity, hate speech, and internet political speech. First we should look at a different definition from Cass R. Sunstein.

According to Sunstein, there are two questions that must be asked when deciding whether speech may be prohibited or not. "First: Does the speech at issue qualify as 'low-value'? ...Second: Has the government regulated the relevant speech in a sufficiently neutral way?" (Sunstein 8). The first question is where the two-tiers of speech come into play. It separates speech into high- and low-value speech. The value of the speech, according to Sunstein, is quantified by its importance to the maintenance of a democratic society. "Such speech [high-value] may be regulated, if at all, only on the periphery or outside the Constitution altogether" (Sunstein 9). Low-value speech falls outside the bounds of the Constitution and is considered less important to the maintenance of a democratic society. "This 'low-value' speech may be regulated if the government can show a legitimate, plausible justification" (Sunstein 9). The laws surrounding the prosecution of libel are used as an example of the First Amendment being interpreted in such a manner. If a person is a public figure then the libel law makes

it hard for them to prosecute. This is the reason why tabloids can run information they only think they have and cannot be held responsible for it. When dealing with people who are not categorized as public figures it is much easier to prosecute libel. In the later case there is no need to prove malicious intent, with public figures there is. This essentially has given us two-tiers of speech. Low-value speech in this case would be considered the speech of the non-public figure. High-value speech is considered the case involving the public figure.

The problem with this begins with the fact that the two-tiers are defined not by the constitution, but by either legislative or judicial opinion. One of the main purposes of the First Amendment is to protect the rights of minorities. The legislature does not have the minority in mind when they vote to define low-level speech because they are elected by majorities. They are the voices of the very people that the First Amendment is protecting minorities from. The judicial branch, although it has historically been the vehicle for change for minority populations, has the same flaws inherent in it. The Supreme Court of the United States is appointed by a President (who typically represents the wishes of the majority of the country) and approved by the Senate (who are elected by majorities). They have more freedom to act in favor of the minority since they never have to be elected and serve lifetime appointments, but they are still given their positions by the majority's representatives. When the two-tiers of speech are defined by such groups it makes free speech vulnerable to the whims of the majority.

Sunstein says that the standard for determining the value of speech should be placed on democracy and politics. He defines political speech as "intended and received as a contribution to public deliberation about some issue" (Sunstein 130). In other words

the more politically based the speech is the harder it will be to prohibit. Even after using such a definition the determination of whether that speech is political is not clear and will have to be left up to the courts. This goes back to the problem that high-value speech is what the court considers to be politically relevant at the time. What is defined as low-value speech may often be of very high-value to the person using it, or, in the case of libel, abused by it. Going back to Sunstein's example of libel, a public figure may very well view libel against them as very low-value speech. In certain cases this law may undermine the democracy it is supposed to be protecting. Included in the category of public figures are public officials. If a person is running for public office, and the local paper reports in a libelous fashion something negative about that person (such as they are drug addicts or alcoholics), this may change the course of the election. Due to the fact that the candidate now has to address this issue and spend time and money defending his or herself from a false charge, the people are not given a fair opportunity to view the candidate or the race as it truly is. A non-public figure could easily sue and win in such a case, but for the public figure things are much more difficult. In this case the value of what the law views as low-level speech cost a person an opportunity to serve and cost citizens the right to an unadulterated race.

The second question to be answered in defining protected and unprotected speech is whether the government actor prohibiting the speech acted in a neutral manner. Sunstein defines three specific ways in which the government can go about prohibiting speech. The first is content-neutral in which "the content of the expression is utterly irrelevant to whether the speech is restricted" (Sunstein 11). Viewpoint-based restrictions are the next category in which the "government makes the point of view of the speaker

central to its decision to impose, or not to impose, some penalty" (Sunstein 12). Finally we have viewpoint-neutral content-based restrictions in which "the content of speech is indeed critical… [b]ut the viewpoint of the speaker is not crucial" (Sunstein 12). The most obvious offender of the First Amendment is the viewpoint-based restriction, because it specifically targets groups because of their opinions. Although such restrictions have not always been found to be illegal, they typically are. The problem stems from the other two types of restrictions. In each case the government may be able to prove a significant interest in limiting the speech. One case in which we typically consider that content-neutral speech restrictions are allowed is in the case of distributing campaign materials in a place where people are voting. Here the government restricts all speech, regardless of its content, in order to protect the democratic process. Similarly we can see cases such as false advertisement where a viewpoint-neutral content-based restriction is allowed. No matter what the viewpoint of the individual or group doing the advertising, if the content of that advertisement is false it is illegal.

Problems with this question come from defining a person's intent when delivering the speech. The examples given above are obvious examples of speech that should not be protected. However, when the cases are not so obvious, who are the people that get to decide whether a law is being applied as neutrally as possible or not? This comes back to the Supreme Court. Its job is to decide this question when speech is being prohibited. As was said earlier, the justices are appointed and approved by representatives of the majority population in this country. More likely than not, they are going to be enforcing main-stream values and what they consider to be "as neutral as possible" will be left up to how they interpret these main-stream values. All though this might be true of any case

before the courts, it does prohibit us from clearly defining the speech that falls into the protected and unprotected categories.

All of the problems that we have seen thus far with Sunstein stem from the fact that his method of defining protected and unprotected speech is vague. Unlike Ely, his method is not based on a set of rules, but on a set of decisions. Ely says if one case shows up a certain method will be used, if another case then a different method. Sunstein defines only one method but it is so vague as to leave us with no real definition. It seems that Ely's method is too rigid and Sunstein's method is too soft. In order to show this we will look at three different debates about protected speech and apply both methodologies to the given circumstances.

In the case *Roth v United States*, Justice Brennan ruled that, "On the one hand… obscenity is unprotected speech**;** on the other, [there is] the importance of protecting controversial, unorthodox, and hateful ideas such as those contained in much sex speech" (Romero). The court in this case ruled that things were only obscene if the public viewed them as such. Judge Augustus N. Hand ruled later that "in cases where the material in question contained obscene elements, if it was literature, then it would be deemed protected speech" (Romero). This case was in regard to James Joyce's Ulysses. Using both definitions of obscenity there are problems of vagueness and restrictiveness respectively. Brennan's definition leaves us wondering where exactly the line is drawn, and how do we determine if the public would view something as such. Hand's definition leaves us tied to the fact that if published in the proper format we are tied to decisions we may not like, or may not agree with. If we were to apply Ely's rationale, we would be left with another problem on top of Brennan and Hand's problems.

The basis of Ely's process of decision making on protected speech is that in each case we should apply the rationale based on whether the evil the state is attempting to prevent is tied directly to the speech. The first problem we run into with Ely's approach is in regard to the evil the state is attempting to prevent. What is it? If the evil is defined as the obscenity itself then the evil is tied directly to the speech and we should use an unprotected messages approach. Using this approach we would say that the obscenity would have to fall within a clearly defined definition of unprotected speech. This runs us right into Brennan and Hand's problems in defining unprotected speech. One problem we have with Brennan and Hand is that they do not define unprotected speech but define protected speech. Ely would say that everything is protected unless defined differently. Brennan and Hand's approaches imply that the speech is unprotected unless they define it as protected. In the defense of these two rulings however, as Brennan pointed out, obscenity is unprotected speech. Obviously, some forms of obscenity have always been and probably will always be recognized as illegal. So, one could argue that obscenity has been carved out of protected speech and falls under unprotected messages for Ely's methodology. We do not want to say this, however, because not all forms of obscene speech, such as pornography, are unprotected. So now we are back to Brennan and Hand's problems of defining which speech is unprotected obscenity and which speech is protected obscenity.

The second way to look at this is that obscenity is not the evil that the state is trying to prevent. It could be argued that restrictions on obscenity are imposed in an effort to prevent the overall degradation of society. In much the same way that Senator McCarthy worked to round up and prosecute communist groups, they argue the need to

prevent obscenity from becoming an accepted form of speech. Those communists posed no immediate threat, they were not attempting to overthrow the government, and even if they had been, it is safe to say they would have failed. Obscenity also poses no immediate threat. A person can read as much obscenity as he wants and nothing negative will happen to him or anyone around him. The risk we are running is that obscenity may become an accepted form of speech by society as a whole, and we all might one day be reveling in our obscene literature (also not a very likely risk). Ely would in this case pose a specific threat analysis of the speech in question. Here there does not seem to be a problem with Ely's method because obscenity would be seen to pose no specific threat and would therefore be protected. The outcome would be the same as it was in both Brennan and Hand's cases, but for a different reason.

The problem that arises for Ely from this example of obscenity is that his methodology brings us no closer to having a consistent definition of protected and unprotected speech than previous methods. Even if we accept Ely's premise regarding the two methods (specific threat and unprotected messages), we have shown that there is a problem in the definition of the evil the state is trying to prevent us from. If a judge or justice would like to declare a certain form of obscene speech illegal (such as Brennan and Hand's respective cases) all they would need to do is define the evil as the obscenity itself, not its effect on society. Ely does not offer a method for determining how to clear this hurdle and until he does he has simply shifted the problem to a different question. He has not solved the problem overall.

If we are to apply Sunstein's method to the same case we run into problems that are somewhat different but extremely important nonetheless. First let us ask what value

obscene speech has in our society. This seems to be the question that was being asked by Brennan and Hand when they ruled on such a case. Brennan's comment leads us to believe that offensive language does have some value in our society. Hand specifically outlines for us that literature is speech of high value to our society and should not be restricted. These two justices have obviously decided that the "obscene" speech in question was of high value and should be allowed. The problem with this is that not all people believe that this "obscene" speech is of high value. Justice Harlan, dissenting in the case of *Roth v. United States*, says "Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressible within constitutional standards" (Roth 497). This illustrates perfectly the point that a high or low value judgment on speech of any kind is a matter of the justices involved determining for his or herself what is important political speech. Justice Harlan does not deny that this opinion is that of a "reviewing court." Sunstein's approach here does not help us much. Instead of asking whether the speech is constitutional, we are left asking whether the speech is valuable to the democracy. That answer is ambiguous based on the people dealing with the obscene speech. Some people will find Joyce's Ulysses offensive, some will find it an important literary work. The only people whose opinions matter are those that have seats in the court system to hear the case.

Assuming that we see the speech in this case as having high-value, we still have to determine if the government is using as neutral a regulation as possible. In this case

the publisher, Roth, was indicted for sending obscene advertising for the book, Ulysses, through the mail. This type of regulation is a viewpoint-neutral content-based restriction. No matter what the viewpoint of the author, the advertising of such an obscene book is illegal. The problem with this is that it is hard to prove that such a case is in fact viewpoint-neutral. The only people this law regulates are people who believe that such speech is valuable to our society. People who have found importance in the use of such speech (and there are many) are being regulated because of their viewpoint on what defines protected speech, or at least on what should be protected speech. This, in a certain light, may be seen as regulating a certain group because we do not like its opinions. Obviously not all cases of obscenity are going to be considered this way. A person should not be able to offend another with the use of obscene speech; however in this particular case the attempt to regulate the advertising of a novel is not preventing such offense.

We can see here that Sunstein's approach, much like Ely's, has not solved the problem for us, but simply changed the question. There are no definitive ways to place a value judgment on this obscene speech, which makes it difficult to use in defining protected and unprotected speech. Even if we can determine this, the government's neutrality in regulation is going to be hard to determine. The book in question in the case of *Roth v. United States* is not regulated today. However we can only come to this obvious conclusion in hindsight. At the time of the decision it was contentious, certain people were offended, and the idea that such regulation was unconstitutional was far from obvious. This is only one example where the definitions offered by Ely and Sunstein

leave us with questions. The next example will show more issues with their attempts at defining protected and unprotected speech.

The next instance we will look at involves hate crimes. In recent years hate crime legislation has become a somewhat controversial issue. The idea is that someone who commits a crime that is inspired by hate of a certain group or class of people should be punished for that hate. This type of legislation does not make any new crimes, but punishes the intent of the crime. The argument for this is deterrence insofar as it will keep people from committing hate inspired crimes. The argument against such laws is that it violates a persons right to believe what they want regardless of its veracity. Legislators can criminalize acts but not a person's motivation for such an act. A murder should be considered a murder whether it was inspired by hate of the victims group or by hate of the victim as an individual. So does hate crime legislation violate the first amendment?

In his article, "Cross Burning, Hate Speech, and Free Speech in America," Edward J. Eberle discusses the factors that make hate speech illegal. He starts by looking at two cases that deal with hate crime legislation. The Supreme Court overturned hate crimes legislation in St. Paul, Minnesota because "it selectively proscribed only fighting words based on 'race, color, creed, religion, or gender' as compared to the broader category of fighting words" (Eberle 3). In a second case in Virginia the Supreme Court upheld hate crimes legislation saying that it "could be constitutional if the act was performed with intimidation" (Eberle 3). This causes an obvious problem, because we want to end crimes motivated by hatred of specific groups, but we do not want to infringe on people's First Amendment rights. We want to be able to punish people for crimes

which instill a culture of fear in our society, but we do not want to regulate their right to hold their own opinions.

Eberle proposes a method of punishing hate crimes that would not infringe on the right to free speech. "The focus of governmental attention should not be on regulating speech, except in exigent circumstances, but rather on regulating the underlying behavior that gives rise to bias or hate" (Eberle 3). Basically, the crime should be in the behavior not in the speech. This sounds like Justice Black's speech plus theory. This says that speech alone is not enough to make something a crime, but the actions (or, in Eberle's words, behaviors) can make it a crime. Ely quickly dismisses this saying that justices who use this argument, "refuse to display whatever reasoning in fact underlies the denial of protection, and by their transparent lack of principle substantially attenuate whatever hortatory value there was in the pronouncement that speech is always protected" (109). The problem Ely is seeing is that this method does not protect free speech. It is simply a way for supposed absolutists to get around saying that there are forms of unprotected speech.

Since Ely is going to criticize this method, we should see how his method stacks up in a similar situation. First, we must determine what the evil is that the state is attempting to protect us from. Here we run into a similar problem as we ran into with obscenity because hate crime legislation can be said to deal with the individual victim and is directly tied to the speech, but it is also seen as a deterrent in which case evil is not attached to the speech but a ramification of the existence of the speech. It is easy to see how some hate crimes would absolutely be tied directly to the speech. These crimes are crimes in which an individual is attacked to make a point about all people in the

individual's group. We need to see what happens when an individual is not a target, but simply sees the act in question. For such an instance we will look at Eberle's example of cross burning. Cross burning, assuming it is not on a victim's private property or directed at an individual, can be argued to contain an evil either tied or untied directly to the speech. The argument for having it tied directly to the speech is that it intimidates the people it is aimed at. The argument for having the evil not inherent in the speech is that it simply is furthering a culture of hate, not actually harming anyone. In the former case we must apply an unprotected messages case to the speech in question. In the later case we must apply a specific threat assessment.

In the discussion on obscenity we pointed out the problem in Ely's argument that it does not offer us a way to determine where the evil lies. For the sake of this argument we are going to say that the cross burning is not directed at any individual. In fact we will assume that the group doing the burning has gotten a permit and has notified all of the proper authorities that the action is going to take place. The speech is obviously protected, since there are methods in place to insure its protection (permits and notification). However, the speech is intimidating to the local community. One such instance happened within the last year in northern Ohio. A white supremacist group had a rally that paraded right through a minority community. Needless to say, there was some civil unrest. There was a specific threat to the minority group that lived in the community. The white supremacists walked through that area with knowledge that they were provoking this community. This form of speech was upheld. Using Ely's argument that it was a specific threat to the community in that it was designed to intimidate, the speech should not have been allowed. However, one could also say that Ely's argument

protects this speech because it was not a threat. If the community in question had just stayed away from the group that was parading down its streets, nothing would have happened.

This raises the question of what exactly is a specific threat. Is intimidation a specific threat? Ely says that inciting a riot at a prison is illegal under this method. Who gets to decide what incited the riot? It seems that the line where threatening and unthreatening speech meet is somewhat blurry, and therefore it is left up to the opinion of the courts which may not be consistent over time. Once again, Ely has not solved the problem of protected versus unprotected speech: he has simply changed the question. In cases such as cross burning and hate crimes in general, people are going to want to limit this speech. That seems to make them willing to categorize this speech as threatening, not unjustly, but not necessarily with proper justification. The social reality of the time may dictate the definition of the law. Then the law is not defining the threat, but the society is defining the threat. Laws, in theory, should have a timeless aspect to them. If a society does not like the law it should change the law, not simply reinterpret the law. Under this method the law is open to being constantly reinterpreted, which does not allow us a clear definition.

Using Sunstein's approach to determine if hate speech is constitutional gives us a different perspective on the idea of high versus low-value speech. In the previous case dealing with obscenity speech we determined that the speech in question was high-value because it had a literary value. The question of hate speech is interesting because it is a constitutionally blurry area, as Eberle points out in the two cases used to illustrate the problem. As citizens, most of us do not want such speech in our society. We become

torn when confronted with the obvious fact that any regulation is inherently viewpoint-based. For the first question in this situation we must ask ourselves what we are putting the value on in the speech. The speech itself, it is fair to say, is not of high value in and of itself. As a symbol of our freedom to debate all ideas and have a society where all people are allowed to voice even unpopular opinions the speech may be invaluable. This is something that Sunstein must help us to define. In the case of cross burning and hate speech in general we know that many states have attempted to pass, and some have passed, far reaching laws prohibiting such acts. If we view the political value that is being judged as manifest within the speech itself we can agree that it should be prohibited. When we view the political value as being in the act of speaking as opposed to the speech itself we may be able to say that such acts are important to our freedom and are constitutional.

Sunstein's second question on the form of regulation is also interesting because in the case of hate crime legislation, there is almost always going to be a viewpoint-based restriction. In the two specific cases presented by Eberle, the case from St. Paul was overturned because of this fact and the Virginia case acknowledged the fact and attempted to get around it. In the former case the law made hate speech against specific groups illegal. When only a few groups are protected by hate crime legislation does this mean that other groups must suffer? This is obviously not a neutral law. In order to maintain such a law the speech in question will need to have basically zero value. In the later case that took place in Virginia the court allowed the law under the circumstances that the speech in question caused intimidation. This law is viewpoint-neutral content-based in its regulation. When looked at in this light, the law is not against the speech

itself but the act of intimidation tied to the speech. Here we run into a similar problem that we had with obscenity speech which is that viewpoint-neutral is not a clear-cut idea. In both cases, obscene and hate speech, we see that the speakers are having their viewpoint targeted. The popularity of the viewpoint seems to be the factor in each case that determines whether the regulation is considered neutral or not. Although the courts have also acknowledged an intimidation aspect to these cases, the people whose opinions are being regulated are going to disagree with that assessment. We have effectively said that their opinions do not matter in such cases.

With this case we have introduced new problems with Sunstein's definition. First, we see that he does not clearly define whether the value of the speech is supposed to be judged in the words or in the act of speaking. Secondly, we still cannot seem to place a truly neutral regulation on speech in this case. The problem is further complicated by the fact that we feel that hate speech is something that should be prohibited. It is a harmful to individuals and the groups that are targeted by it. Moreover, it may add to a cycle of hate that could lead to the further detriment of American society. Neither Ely nor Sunstein have offered us a clear and concise way to handle this particular problem.

So far we have seen two problems develop with Ely's method of defining protected and unprotected speech. We will see another problem develop in a third example. This example has to do with internet political speech. In 2000 a group known as Vote-auction attempted to allow people to sell their votes. There was an obvious problem with this and several states sued and had the organization shut down. The group contends "the voter is transformed into a commodity in the electoral system in the United

States; bought and sold through advertisement and media. The designers of the site set out to create a 'direct line' from politician to voter, where Vote-auction would be the unlawful medium for auctioning off votes for money to the highest bidder" (Murray 2). Its claim was that its website was no different than other groups who inadvertently buy votes from people, through media and endorsements. Rebecca Murray, in her article "Voteauction .net: Protected Political Speech or Treason?" asserts that the website may be construed as political speech. However, it may also be construed as commercial speech since there is an attempt being made to sell votes as a commodity. "In *First National Bank v. Bellotti*, the Supreme Court determined that commercial speech is afforded First Amendment protection, unless a compelling state interest could be found which would legitimize restriction of the speech" (Murray 6). The idea here is that Vote-auction was using commercial speech and the state has an obvious right to prevent people from selling their votes in such a manner.

Ely would disregard this because it is defining an action as against state interest after the act took place. He believes that unprotected speech must be clearly defined, and "against state interest" is too broad of a definition. So we should look at how Ely would handle this question. The first thing we must do is determine what the evil is that the state is trying to prevent. In this case it seems that the evil is tied directly to the speech. The state is trying to prevent the sale of votes, which would lead to the degradation of the legitimacy of the American democratic process. The speech in question is used to sell votes. Since the evil the state is trying to prevent is tied directly to the speech, Ely says we should use the method of unprotected messages.

"What distinguishes this 'unprotected messages' approach from the various 'specific threat' approaches…is that here the consideration of likely harm takes place at wholesale, in advance, outside the context of specific cases" (Ely 110). This is not true in the case of internet political speech or political speech in general for that matter. We all know that individual votes are not for sale. A person running for office cannot give money in exchange for votes. However, the Supreme Court has ruled that a person running for office can spend large amounts of money trying to sell his or her case to the public. A group, such as Vote-auction, is able to collect money from donors and use it to sway voters in a myriad of ways. Political Action Committees (PACs) do this all of the time. Since the 2000 election a bill has been passed limiting the amount of money that individuals and companies can give to a political campaign. In the 2004 election, what we saw was people giving large sums of money to organizations that then used the money in a roundabout way to get a candidate elected. It is an indirect way of getting the money to the candidates, basically filtering it through a middle man. The courts upheld this, but there is no law on the books clearly defining political speech.

This makes a blurry and often arbitrary line between protected and unprotected speech. There is little tangible difference between handing hundreds of thousands of dollars to a politician and handing it to a group working in favor of that politician. The commercials will be made, the fundraisers will be had, and money finds its way into the system. There is a saying in politics that money is like water on concrete, it always finds a crack. Vote-auction blatantly said they were trying to buy votes. What is the difference between them and any other PAC? We feel that directly buying votes and donating money to support a candidate is different because the later does not seem to be a selling

of your democratic rights but an action in support of them. By donating to a candidate we are taking part of the process. By selling a vote, we are selling our part in the process.

Ely's approach of unprotected messages is a good one, but it meets a generality problem. Laws dealing with political speech and money are going to have cracks where we do not want them because they are too broad. In such a case, it is left up to judges to determine what is applicable and what is not. This does not allow for Ely's predefined unprotected messages, because each case is approached individually. Laws are never going to be written for individual instances (except in rare and often meaningless instances). So we are left with laws that are too general to clearly define unprotected speech. Once again, Ely has not solved the problem for us. Unprotected messages are not clearly defined in each case. Ely may be right that we should apply the law in such cases as it was previously defined, but too often it is not defined at all. Surely Ely would not be in approval of selling votes, but then again it does not clearly work with his method of determining that it is unprotected.

Sunstein's approach in this question becomes much harder to navigate. Particularly in the first step of the definition we become embroiled in a question that cannot easily be solved. When we ask whether political speech in general and a person's vote in particular is high or low-value there is an obvious answer but it does not correspond to Sunstein's formula. Under Sunstein's approach high-value speech should be almost impossible to regulate. Low-value speech should be easily regulated. Political speech is going to be considered high-value. It is a key to any democracy that the citizens be able to voice any opinion they may have about government in every way possible without infringing on the rights of others. However, in the case of Vote-auction,

they are being hindered not from infringing on the rights of others but from infringing on their own rights. A vote is the most effective means by which we may contribute to the politics and governance of our nation. This, under Sunstein's theory, should make it nearly impossible to regulate because it is of the highest value. Theoretically, in the case of Vote-auction.com we have said that we must regulate the use of citizens' votes in order to protect their right to use them. Sunstein's theory does not make the ruling in this case wrong. However, it does illustrate the courts ability to revalue speech based on its use. Here we see that political speech depends on more than content but also on the nature of its use.

With regards to the second portion of Sunstein's approach, the regulation against the speech in this case is ruled as content-neutral. In this case it does not matter what a person's opinion is, if he is selling his vote it is illegal. The problem is that it could also be defined as viewpoint-neutral content-based. People sell themselves all of the time in such ways. People who work as political operatives may be considered as willing to sell their political voice to the highest bidder. If a person is willing to advocate for the person who pays him the most, is this not just as bad as selling a vote? Consider that this person has a certain amount of status in our society and that people may be swayed by his opinions. Is it right that they will advocate for the politician that will put the most money in their pockets? A person like this may be able to sway the outcome of an election, and he is willing to do it because of the financial position he will be in afterwards. We see this everyday in politics. Political parties will pay people to advocate for them on news radio and 24-hour news networks. This seems to me more likely to sway an election than buying individual votes would be, yet there is no problem seen with this. Looking at the

question through this light we may be able to say that the regulation is not content-neutral, but viewpoint-neutral content-based. The vote is looked at as a subset of a larger group of political speech content that is not regulated, as opposed to as a type of content unto itself which is entirely regulated.

With the illustration of the Vote-auction case we have seen another problem that stems from Sunstein's attempt to define protected speech. Sunstein's approach does seem to account for this type of speech in that some high-value speech may be regulated, if reevaluated as low-value. Secondly, we have seen another problem with his defining the neutrality of regulation. Sunstein and Ely both have problems with the fact that their definitions seem to offer us more questions than they solve.

We have seen that Ely's approach to handling the definitions of protected and unprotected speech has three specific problems. The first problem is that it relies on the court's ability to clearly define and agree on what it is the state is attempting to prevent in each case. In two of the three cases we saw this was not clear at all. If the decision on whether the evil being prevented is tied to the speech or not is ambiguous, then so is the method following. Ely needs to do a better job determining this for us. In the instance where a specific threat is deemed appropriate we found another problem. Courts are forced to decide what constitutes a threat and what does not. In some cases this is obvious, in other cases it is not. It is these later cases that are the most important because these are the cases where are civil liberties have the chance to start eroding. Ely is too general in describing what a threat is. Most people are going to get behind him in saying that threats are not protected, people are going to split about what constitutes a threat and what does not. Finally, Ely had another problem in defining what unprotected messages

were. Even if we can determine to use such an approach, it has been shown that there are cases where it is not clear if the message is unprotected or not. This is due to the fact that laws are written at a level of higher generality than individual crimes are tried on. Judges are forced to interpret the laws to the best of their ability, but this can lead to arbitrary rulings. Although this is how the judicial process is setup, it does not allow for a clear definition of the rulings.

Sunstein runs into several problems of his own. The first problem we see is that his definition is too broad. In an attempt to give us a comprehensive understanding of what protected and unprotected speech are, he has given us a definition that fails to adequately define speech in specific cases. With regards to the first portion of his approach it seems to be easily based on the opinions of those charged with ruling on any given case. A value judgment is always going to be at least partially left to the whims of those with the power of giving such a judgment. To say that any speech is of high or low value is to allow for the fact that majority opinion may usurp the rights of the minority, which is what the First Amendment was put in place to prevent. When we approach the second portion of Sunstein's attempt to define protected and unprotected speech we run into another problem similar to that of the first portion. In the three cases above we have been able to show how the courts viewed the level of neutrality and how it affected their judgment. We were also able to show how, if viewed differently, the case could have turned out in another direction. To say that a law's constitutionality is based on the government's neutrality is similar to Ely attempting to define whether the threat lies in the speech or in the effects of the speech. The social reality of the moment may determine the way we view the case. Theoretically the Constitution is designed to protect

us from such decisions. It is a timeless document applicable to all ages, however, when given to the whims of the moments we risk its legitimacy.

The problem with any definition of protected and unprotected speech rests in the fact that no definition can cover every situation. Either the definition will be too broad, as in the case with Sunstein, or it will be too strict, as in Ely's case. The question that should be posed now is whether or not this is a problem. The judicial system is designed to answer such questions. The founders knew that laws would have to be interpreted by men, and the judiciary is setup for occasions like the ones we have explored. In a stable democracy the judiciary will not always make the right decision, but hopefully they will move us closer and closer to that more perfect union envisioned at the birth of our republic. There are always going to be problems inherent in a government of fallible men and women. However, building on the ideals set forth in our Constitution and Bill of Rights, we may strive for a more equal, fair, and just society.

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